

BEFORE THE  
CALIFORNIA HORSE RACING BOARD  
STATE OF CALIFORNIA

In the Matter of the:

Appeal from Board of Stewards Official  
Rulings #46 and #47, Capitol Racing  
Association, Dated March 7, 2001

ANTONINO GRISTINA,

Appellant.

Case No. SAC 01-015

OAH No. N-2001030558

**PROPOSED DECISION**

Administrative Law Judge Catherine B. Frink, State of California, Office of Administrative Hearings (“OAH”) heard this matter in Sacramento, California on April 18, 2001.

Kay Lauterbach, Deputy Attorney General, represented the California Horse Racing Board (“CHRB”).

Appellant was represented by Glen A. Van Dyke, Esq. and Sherri Adams, Esq., Salinger Van Dyke, Attorneys at Law, 8788 Elk Grove Boulevard, Building 2, Suite C, Elk Grove, California 95624. Appellant did not personally appear at the hearing; however, by stipulation of the parties, appellant testified by telephone.

Evidence was received, the hearing was closed, and the matter was submitted for decision on April 18, 2001.

**PROCEDURAL BACKGROUND**

On March 3, 2001, the Board of Stewards (“Stewards”) of the CHRB, Capitol Racing Association at Cal Expo, Sacramento, California, conducted a hearing in response to three complaints filed against trainer Antonino Gristina (“appellant”), Case Nos. 01SW-007, 01SW-008 and 01SW-009. The complaints alleged violations of specified provisions of Title 4, California Code of Regulations (“Rules”), namely Rule 1887 (Trainer to Insure Condition of Horse) and Rule 1843(d) (Medication, Drugs and Other Substances).

On March 10, 2001, the Stewards issued a Statement of Decision in Case Nos. 01SW-007, 01SW-008 and 01SW-009, which included Findings of Fact, Applicable Statutes and Regulations, Conclusion, and Rulings #46 and #47, as set forth below. The Stewards made the following Findings of Fact:

“I

“Gristina was the trainer of record for the horse Katy’s Fella and entered the horse to race in the Third Race on January 21, 2001 at Capitol Racing Assoc. LLC finishing first.

“II

“Sample #L85071 was tested by U.C. Davis Laboratory and was found to contain three prohibited substances, which were: EPHEDRINE (Class Two), PHENYLPROPANOLIMINE (Class Three) and GUAFENESIN (Class Five).

“III

“On February 3, 2001 Gristina waived his right under Board Rule #1859.5 (Split Sample Testing).

“IV

“Gristina has been a licensed trainer in this jurisdiction since February 18, 2000, and has participated on horse racing in other jurisdictions.”

The Stewards concluded that appellant was given every opportunity during the hearing to provide information to explain the laboratory’s finding of prohibited substances in the test sample collected from “Katy’s Fella,” but appellant was unable to provide any plausible explanation. The Stewards considered the severity of the violations, including the fact that three separate prohibited substances were found in the test sample, including one Class Two drug and one Class Three drug, and noted that a penalty in excess of a six-month suspension could be sought. However, the Stewards considered appellant’s prior history without medication violations, as well as his “complete cooperation during the investigation and hearing” in determining the penalty herein.

Based on the Findings of Fact and Conclusion, the Stewards issued Ruling #46, which provided as follows:

“TRAINER ANTONINO GRISTINA, WHO STARTED ‘KATY’S FELLA’  
IN THE THIRD RACE, FINISHING 1<sup>ST</sup> ON JANUARY 24, 2001 AT  
CAPITOL RACING L.L.C., IS HEREBY SUSPENDED FOR A PERIOD OF  
ONE HUNDRED AND TWENTY DAYS (120) COMMENCING MARCH

14, 2001 THROUGH AND INCLUDING JULY 10, 2001 FOR VIOLATION OF CALIFORNIA HORSE RACING BOARD RULES #1887 (TRAINER TO INSURE CONDITION OF HORSE) AND RULE #1843(D) (MEDICATION, DRUGS AND OTHER SUBSTANCES – [EPHEDRINE (CLASS 2), PHENYLPROPANOLAMINE (CLASS 3), AND GUAFENESIN (CLASS 5) PROHIBITED SUBSTANCES].”

The Stewards also issued Ruling #47,<sup>1</sup> which provided in pertinent part as follows:

“ACTING UPON A REPORT FROM U.C. DAVIS LABORATORY, OFFICIAL CHEMIST FOR THE CALIFORNIA HORSE RACING BOARD, THAT POST RACE SAMPLE #L85071 TAKEN FROM THE HORSE ‘KATY’S FELLA’, 1<sup>ST</sup> PLACE FINISHER IN THE THIRD RACE AT CAPITOL RACING L.L.C., CAL EXP ON JANUARY 24, 2001, SHOWED THE PRESENCE OF THE PROHIBITED (CLASS 2) SUBSTANCE ‘EPHEDRINE’, PROHIBITED (CLASS 3) SUBSTANCE ‘PHENYLPROPANOLAMINE’ AND PROHIBITED (CLASS 5) SUBSTANCE ‘GUAFENESIN’ IN VIOLATION OF CALIFORNIA HORSE RACING BOARD RULE #1843 (A), (B), & (D) (MEDICATION, DRUGS AND OTHER SUBSTANCES), IT IS HEREBY ORDERED THAT THE PURSE MONIES EARNED IN SAID RACE ARE FORFEITED AND THE HORSE ‘KATY’S FELLA’ IS HEREBY DISQUALIFIED AND PLACED ‘UNPLACED’ IN ACCORDANCE WITH CALIFORNIA HORSE RACING BOARD RULE #1859.5 (DISQUALIFICATION UPON POSITIVE TEST)....

“...

“OWNER ANTONINO GRISTINA, PURSUANT TO CALIFORNIA HORSE RACING BOARD RULE #1760 (PURSE AWARD OR PRIZE TO BE WITHHELD) IS HEREBY ORDERED TO RETURN THE FIRST PLACE PURSE OF TWELVE HUNDRED FIFTY DOLLARS (\$1250.00).”

Appellant filed a timely appeal from the Stewards’ Statement of Decision and Rulings #46 and #47. On March 20, 2001, appellant filed a written request for a stay of both rulings. On March 21, 2001, Roy C. Wood, Jr., Executive Director, on behalf of the CHRB, issued an Order Denying Stay.

At the hearing on April 18, 2001, new evidence was received, in the form of testimony from appellant and from Martin J. Snezek II, Senior Special Investigator, CHRB.

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<sup>1</sup> As set forth in the CHRB’s Precedential Decision in Case No. SAC 99-021, In the Matter of the Appeal of Richard Gach, appellant was not entitled to a hearing before the Stewards on the issue of purse forfeiture. However, the Stewards’ Ruling is subject to review by the CHRB pursuant to Business and Professions Code section 19517.

## SUPPLEMENTAL FINDINGS OF FACT

1. Senior Special Investigator Martin J. Snezek II was assigned to investigate the allegations of prohibited substances found in post race sample #L85071 pertaining to harness horse “Katy’s Fella.” On or about February 2, 2001, Snezek contacted appellant by telephone concerning a positive drug test for “Katy’s Fella” and asked appellant to come to the office the following day. On February 3, 2001, Snezek met with appellant and notified him of the test results. Snezek informed appellant of the 72-hour time limit for the request of a split sample test to be performed. Appellant told Snezek that he did not have the money to pay for split sample testing. Appellant also said he could not afford an attorney or to pay a fine. Appellant wanted to conclude the hearing process as soon as possible so that he could serve a suspension during the time when the track was closed.

2. A “barn search” of appellant’s personal effects and property was conducted on February 3, 2001 pursuant to Rule 1929 (Examination of Personal Effects). Appellant, Snezek and State Veterinarian Robert Goodbery were present during the search. A used over-the-counter asthma inhaler was found during the search and was confiscated.

3. Appellant had no prior experience with medication violations for prohibited substances. Appellant had one prior case involving a “high bute,” i.e., a determination that a post-race sample taken from a horse trained by appellant contained a permitted substance in an amount in excess of that permitted by regulation. Appellant asked other trainers what the potential penalty would be for a first offense medication violation. Appellant was not told by anyone that a four-month suspension was a possible penalty.

4. Appellant and Snezek discussed the possible penalties for violation of the CHRB’s medication rules, whether the state veterinarian and/or a person from the chemical testing laboratory would be called as witnesses, and whether or not appellant needed an attorney for the Stewards’ hearing. The facts concerning these discussions are disputed by the parties. Appellant testified that he asked Snezek what the penalty would be for this medication violation if he agreed with everything without an attorney. Appellant claims that Snezek told him that the penalty would probably be a one-month suspension and possibly a fine. Appellant testified that he asked Snezek if he needed an attorney, and Snezek told him if an attorney became involved, the penalty could be different. Appellant testified that he also asked if the veterinarian was going to be present at the hearing, and Snezek said that he would be there to testify what drugs were in the inhaler found in the barn; it was appellant’s belief that the veterinarian was claiming that the drugs contained in the inhaler were the same drugs that were found in the post-race sample. Appellant testified that Snezek told him that someone from the testing laboratory would also be at the Stewards’ hearing.

5. In contrast to the testimony of appellant, Snezek testified that when appellant asked what the penalty would be for the alleged medication violations herein, Snezek advised appellant that there was a possibility of a suspension or fine for each violation. Snezek denied telling appellant that, if he did not hire an attorney, he would only get a 30-day penalty. Snezek testified that he and appellant discussed the possibility of a more lengthy

suspension in lieu of a fine, which appellant claimed he could not afford. Snezek testified that, when asked by appellant if he needed an attorney, Snezek said he could not give him advice on that; Snezek recommended that appellant take advantage of the 72-hour time to order a split sample test to consider his options, but appellant decided to waive his right to a split sample test. With respect to the question of calling witnesses at the Stewards' hearing, Snezek testified that he told appellant that he probably would not call the State Veterinarian as a witness, because the drugs contained in the asthma inhaler found during the barn search were not the same as the prohibited substances found in the post-race sample.

6. Under all of the circumstances herein, it was not established by a preponderance of the evidence that appellant relied on statements by Snezek that he would only receive a 30-day suspension if he did not contest the charges against him and/or that he did not need to hire a lawyer for the Stewards' hearing. Snezek's testimony that he did not discuss a particular length of possible suspension was credible. Appellant clearly inferred from his conversation with Snezek that if he cooperated with the investigation, he would benefit by receiving a lesser penalty than if he contested the charges against him. Snezek's remarks to appellant were influenced by his belief, based on conversations with appellant, that appellant could not afford an attorney. With respect to the calling of witnesses at the Stewards' hearing, it appears from the testimony at the hearing herein, and as reflected in the transcript of the March 3, 2001 Stewards' hearing, that appellant misunderstood the position of the CHRB with respect to the connection (or lack thereof) between the asthma inhaler and the allegations of medication violation. Appellant's interest in having the State Veterinarian or a laboratory employee testify was related to his contention that the drugs in the inhaler were not connected to the prohibited substances found in the test sample, an issue that was ultimately not disputed by the CHRB.

7. Snezek appeared at the Stewards' hearing on behalf of the CHRB to present evidence. At the Stewards' hearing, appellant did not object to the introduction of any of the evidence offered against him. Appellant understood that he had the right to object; however, he did not do so because he believed that he would be treated more leniently if he cooperated with the CHRB's investigation and did not contest the evidence. In fact, the Stewards did consider appellant's "complete cooperation during the investigation and hearing" in determining the penalty ultimately imposed.

## STANDARD OF REVIEW

Under Rule 1761, every decision of the Stewards, except a decision concerning disqualification of a horse due to a foul or a riding or driving infraction, may be appealed to the CHRB. Under Business and Professions Code section 19517(a), the CHRB may overrule a Stewards' decision "if a preponderance of the evidence indicates any of the following: (1) The steward mistakenly interpreted the law. (2) New evidence of a convincing nature is produced. (3) The best interests of racing and the state may be better served." Pursuant to Rule 1764, "[t]he burden shall be on the appellant to prove the facts necessary to sustain the appeal."

According to the CHRB's Governing Procedure applicable to this proceeding, appellant bears the burden on appeal of showing that the law was improperly interpreted or applied by the Stewards and/or that the Stewards' factual determinations were not supported by substantial evidence. The review to be performed in this appeal is analogous to the review engaged in by the Superior Court when reviewing an administrative agency's decision under Code of Civil Procedure section 1094.5(c). (Powers v. City of Richmond 1995) 10 Cal.4<sup>th</sup> 85, 93; Jones v. Superior Court (1981) 114 Cal.App.3d 725). As the court stated in Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal.App.3d 517, at p. 532: "Substantial evidence is defined as: "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, ..." (Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302, 307) or evidence of "ponderable legal significance ... reasonable in nature, credible, and of solid value." (Ofsevit v. Trustees of Cal. University & Colleges (1978) 21 Cal.3d 763, 773, fn. 9)." The evidence must be viewed in the light most favorable to the Stewards' Findings of Fact and all reasonable inferences must be drawn in favor of the Stewards' Ruling. See, County of El Dorado v. Misura (1995) 33 Cal.App.4th 73, 84-85.

Code of Civil Procedure section 1094.5(b) provides that the superior court determines whether the agency engaged in an abuse of its discretion. An abuse of discretion may be shown if the Board of Stewards "has not proceeded in the manner required by law (without or in excess of jurisdiction), the order or decision is not supported by the findings, or the findings are not supported by the evidence". It is the burden of appellant to demonstrate that the Stewards have, in fact, abused their discretion. (Holmes v. Hallinan (1998) 68 Cal.App.4<sup>th</sup> 1523, 1535).

In determining whether the evidence supports the findings or an order or decision is supported by the findings, the court uses the substantial evidence test. (Jones v. Superior Court, *supra*, 114 Cal.App.3d at 730; Code of Civil Procedure section 1094.5(c)). Under this test an abuse of discretion is established if the Stewards' findings upon review of the whole administrative record, are not supported by the evidence.

## STATUTORY AND REGULATORY BACKGROUND

Rule 1405 provides that violation of any provision of the CHRB Rules, "whether or not a penalty is fixed therein, is punishable in the discretion of the Board by revocation or suspension of any license, by fine, or by exclusion from all racing enclosures under the jurisdiction of the Board, or by any combination of these penalties."

Rule 1528 states as follows:

"The stewards' jurisdiction in any matter commences at such time as entries are taken for the first day of racing at the meeting and extends until thirty (30) days after the close of such meeting. However, the

Executive Director or the Board may delegate the authority to adjudicate any matter occurring at any racing meeting to another Board of Stewards at any time. The stewards may suspend the license of anyone whom they have the authority to supervise or they may impose a fine or they may exclude from all inclosures in this State or they may suspend, exclude and fine. All such suspensions, fines or exclusions shall be reported immediately to the Board.”

Under Rule 1528, the Stewards have the authority to suspend a trainer under the circumstances set forth herein.

Rule 1887 (Trainer to Insure Condition of Horse) states in pertinent part that:

“(a) The trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties, except as otherwise provided in this article. If the chemical or other analysis of urine or blood test samples or other tests, prove positive showing the presence of any prohibited drug substance defined in Rule 1843.1 of his division, the trainer of the horse may be fined, his/her license suspended or revoked, or be ruled off. In addition, the owner of the horse, foreman in charge of the horse, groom, and any other person shown to have had the care or attendance of the horse, may be fined, his/her license suspended, revoked, or be ruled off.”

The CHRB regulates the administration of all medications and drug substances to horses participating in races. (Rule 1843 et seq.; Business and Professions Code sections 19580, 19581 and 19582). Rule 1843 (Medication, Drugs and other Substances) states that:

“It shall be the intent of these rules to protect the integrity of horse racing, to guard the health of the horse, and to safeguard the interests of the public and the racing participants through the prohibition or control of all drugs, medications and drug substances foreign to the horse. In this context:

“(a) No horse participating in a race shall carry in its body any drug substance or its metabolites or analogues, foreign to the horse except as hereinafter expressly provided.

“(b) No drug substance shall be administered to a horse which is entered to compete in a race to be run in this State except for approved and authorized drug substances as provided in these rules.

“(c) No person other than a licensed veterinarian or animal health technician shall have in his/her possession any drug substance which can be administered to a horse, except such drug substance prescribed by a licensed veterinarian for a specific existing condition of a horse and which is properly labeled.

“(d) A finding by an official chemist that a test sample taken from a horse contains a drug substance or its metabolites or analogues which has not been approved by the Board, or a finding of more than one approved non-steroidal, anti-inflammatory drug substance, or a finding of a drug substance in excess of the limit established by the Board for its use shall be prima facie evidence that the trainer and his/her agents responsible for the care of the horse has/have been negligent in the care of the horse and is prima facie evidence that the drug substance has been administered to the horse.”

Rule 1843.1 (Prohibited Drug Substances) provides that:

“For purposes of this division, prohibited drug substance means:

“(a) any drug, substance, medication or chemical foreign to the horse, whether natural or synthetic, or a metabolite or analog thereof, whose use is not expressly authorized in this article.

“(b) any drug, substance, medication or chemical authorized by this article in excess of the authorized level or other restrictions as set forth in this article.”

Business and Professions Code section 19580 provides a statutory basis for the adoption of regulation to establish policies, guidelines and penalties for the imposition of penalties relating to equine medication for the purpose of preserving and enhancing the integrity of horse racing in the State.

Business and Professions Code section 19851 prohibits the administration of any substance to a horse after it has been entered in a race (48 hours prior to race time), unless specifically authorized by regulation.

Business and Professions Code section 19582 provides for penalties based on the nature of the violations of section 19581. These penalties include suspension for up to three years, monetary penalties of not more than \$10,000 and disqualification of purses.

## REVIEW

### A. Procedures Applicable to These Proceedings

#### 1. CHRB Procedures

As reflected in the transcript of the Stewards' Hearing on March 3, 2001, as well as the Stewards' Statement of Decision, appellant timely received a copy of the Governing Procedure for Hearing Before the Board of Stewards (“Governing Procedure”). The Governing Procedure provides in pertinent part as follows:

“... ”

“2. You will have an opportunity to present your side of the case and rebut the case against you, including the opportunity to cross-examine witnesses who testify against you. You must bring all of your witnesses and all of your evidence to the hearing.

“3. You are entitled to be represented by an attorney at the hearing.

“... ”

“12. If you timely appeal from a Board of Stewards’ decision, the matter will be heard on behalf of the CHRB by an administrative law judge (ALJ) or referee designated by the CHRB. On appeal, you bear the burden of showing that the law was improperly interpreted or applied by the stewards and/or that the stewards’ factual determinations were not supported by substantial evidence, or that the best interest of racing in the State may be better served by reversal or modification of the stewards decision. The ALJ/referee will draft a proposed decision and submit it to the CHRB.

“... ”

2. Applicability of the Administrative Procedure Act (Government Code section 11340 et seq.)

Appellant contends that Chapter 5 of the Administrative Procedure Act (“APA”) (Administrative Adjudication: Formal Hearing) is applicable to these proceedings. Appellant’s contention is not persuasive. Government Code section 11501(a) provides that Chapter 5 “applies to any agency as determined by the statutes relating to that agency.” Business and Professions Code section 19461 provides that every license granted under the Horse Racing Law “is subject to suspension or revocation by the board.... All proceedings **to revoke a license** shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code [Chapter 5 of the APA]” (emphasis supplied). Thus, only revocation proceedings are subject to Chapter 5 of the APA by statute. Government Code section 11425.10 (a)(2), a portion of the Administrative Adjudication Bill of Rights, requires that an agency “make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding.” The CHRB’s Governing Procedure is silent on the issue of whether Chapter 5 of the APA applies to Stewards hearings; in the absence of language making Chapter 5 applicable to these proceedings, it is reasonable to conclude that Chapter 5 is inapplicable.

Applicant contends that, since revocation of appellant’s license was one possible penalty that could have been imposed against him, Chapter 5 of the APA should be

applicable. This argument is not persuasive. If, after the Stewards' hearing, the Stewards felt that revocation of appellant's license was warranted, the Stewards would have referred the matter to the CHRB, and appellant would have been entitled to an administrative hearing on the issue of license revocation before an administrative law judge under Chapter 5 of the APA. Such is not the case here.

Chapter 4.5 of the APA (Administrative Adjudication: General Provisions) does apply to these proceedings. Pursuant to Government Code section 11410.20(a), except as otherwise expressly provided by statute, Chapter 4.5 of the APA "applies to all agencies of the state." According to Government Code section 11405.30, an "agency" includes "a board ...or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head." An "agency head" means "a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide." (Government Code section 11405.40). The CHRB is clearly an "agency" and an "agency head" within the meaning of Government Code sections 11405.30 and 11405.40," and is an "agency of the state" within the meaning of Government Code section 11410.20(a).

According to Business and Professions Code section 19440(a)(3), the responsibilities of the CHRB include "adjudication of controversies arising from the enforcement of those laws and regulations dealing with horseracing and parimutuel wagering." Business and Professions Code section 19440(b) provides that the CHRB may delegate to stewards any of its powers and duties that are necessary to carry out fully and effectuate the purposes of the California Horse Racing Law (Business and Professions Code section 19400 et seq.).

Government Code section 11405.20 defines "adjudicative proceeding" as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." Chapter 4.5 of the APA "applies to a decision by an agency if, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." (Government Code section 11410.10).

Read together, Business and Professions Code section 19440 and Government Code section 11405.20 require that proceedings before the Stewards involving the adjudication of controversies arising from the enforcement of laws and regulations dealing with horseracing, which involve evidentiary hearings for determination of facts and the issuance of a decision, are subject to Chapter 4.5 of the APA.

### 3. Evidentiary Standard to be Applied

Evidence Code section 300 states as follows:

“Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal, superior court, or municipal court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.”

The Law Revision Commission Comment to Evidence Code section 300 states in pertinent part as follows:

“Section 300 makes the Evidence Code applicable to all proceedings conducted by California courts except those court proceedings to which it is made inapplicable by statute. **The provisions of the code do not apply in administrative proceedings**, legislative hearings, or any other proceedings unless some statute so provides or the agency concerned chooses to apply them.

“Various code sections—in the Evidence Code as well as in other codes—make the provisions of the Evidence Code applicable to a certain extent in proceedings other than court proceedings. *E.g.*, Govt. Code section 11513 (a finding in a proceeding conducted under the Administrative Procedure Act may not be based on hearsay evidence unless the evidence would be admissible over objection in a civil action); ...Evidence Code section 910 (provisions of the Evidence Code relating to privileges are applicable in all proceedings of every kind in which testimony can be compelled to be given);...” 7 Cal.L.Rev.Comm. Reports 1 (1965) (emphasis added)

The CHRB’s Governing Procedure applicable to this proceeding does not address the issue of the types of evidence that are admissible and/or sufficient to sustain a finding. As addressed previously, Chapter 5 of the APA is inapplicable to this proceeding; hence Government Code section 11513 (Evidence) and Government Code section 11515 (Official Notice) do not apply herein.

It is a general principle of administrative law that, “administrative agencies need not concern themselves with the rules of evidence, but may hear and consider any testimonial offer which is made.” Cooper, Frank E., State Administrative Law, Vol.1, Am. Bar Foundation, 1965, p. 380. It is likewise noted by Kenneth Culp Davis that “The idea was established early in the 20<sup>th</sup> century that the exclusionary rules of evidence were for jury trials, not for nonjury trials and not for agency trials.” Davis, K. Administrative Law Treatise, 2d Ed., Vol. 3, K.C. Davis Pub. Co., 1980, section 16.4, p. 235. Section 556(d) of the Federal Administrative Procedure Act provides that “any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence.”

California courts have held that, in the absence of a statutory authorization, it is error to admit hearsay over objection in administrative hearings. August v. Department of Motor

Vehicles (1968) 264 Cal.App.2d, 52, at p.64; Fankhauser v. Orr (1968) 268 Cal.App.2d 418, at p. 422. These court cases did not specifically address the issue of whether hearsay that would qualify under an Evidence Code exception to the hearsay rule could be admitted over objection in an administrative hearing.

Under all of the circumstances herein, and given the lack of definitive guidance in CHRB statutes, regulations and Governing Procedure, it is reasonable to apply a more relaxed evidentiary standard to the Stewards proceeding, and to allow evidence to be admitted if it is relevant and reliable. Under that standard, hearsay evidence that would qualify under an exception to the hearsay rule, if properly authenticated (i.e., reliable), would be admissible. However, hearsay evidence that did not qualify under an exception to the hearsay rule is not admissible if objected to by the opposing party.

B. Basis for Appeal

1. Appellant's Failure to Seek Representation at the Stewards' Hearing

Appellant contends that he was wrongfully persuaded by CHRB investigator Snezek not to get an attorney for the Stewards' hearing, thereby resulting in a denial of due process. This contention is not persuasive and is not supported by the evidence. Appellant was advised both at the Stewards' hearing and in the Governing Procedure that he was entitled to be represented by counsel at the Stewards' hearing. However, the costs associated with hiring an attorney must be borne by the party. In the present case, appellant told Snezek prior to the Stewards hearing that he could not afford an attorney. As set forth in Supplemental Finding 6, it was not established that Snezek told appellant that he did not need an attorney.

Appellant further contends that he was misled into thinking that an attorney was not necessary at the Stewards' hearing because the CHRB's investigator did not wish to present witness testimony at the hearing. This contention is likewise not supported by the evidence. CHRB investigator Snezek believed that appellant would not be represented by counsel due to a lack of funds to pay for representation, and he was further aware of the fact that appellant intended not to contest the charges and to cooperate with the investigation, in the hopes of receiving leniency from the Stewards. It was not established that Snezek prepared differently for the Stewards' hearing because appellant was not represented by counsel.

Finally, appellant contends that the CHRB had a strategy designed to "overpower" appellant in the hearing and prevent him from testifying in his own behalf or otherwise presenting evidence. Appellant's citations to the hearing transcript do not support this contention. Rather, appellant's conduct at hearing is explained by his decision not to contest the charges and to cooperate with the investigation. Appellant was given the opportunity to testify on his own behalf and present evidence, but the Stewards found that appellant could offer no plausible explanation for the finding of prohibited substances in the post-race sample.

Having chosen to appear at the Stewards hearing without counsel, neither the Stewards nor the CHRB investigator were required to accord appellant any special treatment. “When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys (Monastero v. Los Angeles Transit Co. (1955) 131 Cal.App.2d 156, 160 [280 P.2d 187]; Muller v. Muller (1959) 141 Cal.App.2d 722, 732 [345 P.2d 29]; Doran v. Dreyer (1956) 143 Cal.App.2d 289, 290 [299 P.2d 661]; Sorci v. Crisci (1957) 150 Cal.App.2d 90, 95 [309 P.2d 937]; Taylor v. Bell (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855]). Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney (Monastero, supra, at p. 160).” Nelson v. Gaunt (1981) 125 Cal.App.3d 623, 638-639.

## 2. Sufficiency of the Evidence at Hearing

Appellant contends that the evidence presented on behalf of the CHRB in the Stewards’ hearing lacked foundation and was inadmissible hearsay. Appellant attempted to object to the admission of hearsay evidence after the conclusion of the Stewards hearing and prior to receiving the Statement of Decision, relying on Government Code section 11513(d), which states that, “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.” As noted previously, Chapter 5 of the APA does not apply to suspension proceedings before the CHRB; therefore Government Code section 11513 is not controlling herein.

Respondent having failed to object to the CHRB’s evidence at the Stewards’ hearing, the Stewards properly considered that evidence in making their Ruling. Appellant knew he had the right to object to evidence at the hearing, but made a conscious decision not to do so, as set forth in Supplemental Finding 7. The Stewards’ factual determinations were supported by substantial evidence.

## 3. Failure to Adopt Penalty Regulations

Appellant contends that the CHRB has failed to establish penalties for equine medication violations as mandated in the enabling legislation set forth in the Business and Professions Code; consequently, appellant had no other alternative but to rely on statements from Mr. Snezek, the CHRB’s investigator, as to the possible penalties, thereby rendering the 120 day suspension imposed on appellant by the Stewards arbitrary and capricious. As set forth in the CHRB’s Precedential Decision in Case No. SAC-00-034, In the Matter of the Appeal of Jeffrey Boyd and Corrine Hills-Boyd, the CHRB may impose a penalty for equine medication violations in the absence of CHRB-adopted regulations providing specific penalties for such violations. As previously set forth in Supplemental Finding 6, it was not established by a preponderance of the evidence that appellant relied on statements by Snezek that he would only receive a 30-day suspension if he did not contest the charges against him. Snezek denied mentioning a specific length of suspension that was likely to be imposed. In addition, appellant was charged with three separate medication violations. Any impression

appellant might have formed from talking to other trainers about the likely penalty for a “first offense” apparently did not take into account the complete facts of the case herein. The Stewards were free to exercise their discretion in determining an appropriate penalty. The Statement of Decision reflects that they took appellant’s cooperation into consideration as a factor in mitigation. Under all the circumstances herein, the penalty imposed does not constitute an abuse of discretion.

### LEGAL CONCLUSIONS

A review of the entire record before the CHRB reveals that the Stewards did not mistakenly interpret the law and that no new evidence of a convincing nature was produced at hearing. It was not established that the best interests of racing and the state may be better served by granting the appeal herein.

### ORDER

The Board of Stewards’ Rulings #46 and #47, Capitol Racing Association, dated March 7, 2001, against trainer Antonino Gristina, are upheld, and the appeal is dismissed.

Dated: \_\_\_\_\_

\_\_\_\_\_  
CATHERINE B. FRINK  
Administrative Law Judge  
Office of Administrative Hearings